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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 397

GEORGE MyNATT, ET AL., *Petitioners*

v.

POTOMAC ELECTRIC POWER COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SHELDON E. BERNSTEIN
Pennsylvania Building
Washington, D. C.

HERBERT M. BRUNE
10 Light Street
Baltimore, Maryland

R. EDWIN BROWN
102 South Perry Street
Rockville, Maryland

HARPER M. SMITH
100 South Perry Street
Rockville, Maryland

Attorneys for Petitioners

Of Counsel:

BERNSTEIN & KLEINFELD
Pennsylvania Building
Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No.

GEORGE MANAIA, ET AL., *Petitioners*

v.

POTOMAC ELECTRIC POWER COMPANY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, George Manaia, Jose Santos Gago, James R. Bice, Administrator of the Estate of Jose Lourenco, deceased, State of Maryland to the use of Maria Da Conceivao Barreto, Joaquim Barreto Lourenco, by his next friend, James R. Bice, Richard P. Mason, William H. Davis, Maurice Floyd Ambush and State of Maryland to the use of John Fillmore Ambush, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment notwithstanding the verdict entered by the United States District Court for the District of Maryland after a plaintiffs' verdict.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ..... F.2d ..... (also II TR 3-14 and Appendix *infra* pp. 1a-11a).[1] The opinion of the District Court is reported at 163 F. Supp. 671 (also I TR 2-20).

JURISDICTION

The judgment of the Court of Appeals was entered June 18, 1959 (II TR 15, App. *infra* p. 12a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Employees of a paving contractor were electrocuted while standing on a public street when the boom of a crane locked in position became energized from a 33,000 volt line 30 inches from the boom. Defendant[2] power company knew that the 1½ block street, across and alongside which it maintained electric lines strung from poles at ordinary heights, was to be paved with concrete and there was substantial evidence it should have known a crane would be used near its wires to position heavy machinery. The evidence was conflicting whether the construction personnel should have recognized that the power line was high tension and whether the power company might have anticipated how the crane might be used. Under a detailed charge as to the scope of a power company's duties and the limits thereof with respect to fortuitous circumstances, the jury returned a plaintiffs' verdict on the claim that

[1] The certified transcript (referred to as "TR") from the Clerk of the Fourth Circuit is in two volumes; I is the original Joint Appendix filed in that Court and II contains the usual Appellate Orders and Opinion. Nine additional copies of I have been lodged with the Clerk of this Court.

[2] For convenience, petitioners may sometimes hereinafter be referred to in their trial court status as "plaintiffs" and Potomac Electric Power Company as "Pepco" or "defendant."

the defendant negligently failed to warn that the particular line was high tension. The trial court having granted judgment n.o.v., but having denied a motion for a new trial, and the Court of Appeals having affirmed, the questions arise:

1. Whether by selecting the particular evidence, inferences and norms of experience to be considered in determining the sufficiency of the evidence to support the verdict, the courts below unconstitutionally intruded into the jury's exclusive province of selecting and discarding the evidence to be considered in reaching a verdict.

2. Whether involved in determining the extent to which a power company maintaining high tension lines should anticipate perils from known construction work in the near vicinity, are such "incommensurables" peculiarly within the constitutional province of the jury to resolve that its verdict, rendered under a proper charge, should be immune from re-evaluation on motion for judgment n.o.v.

3. Whether the conflict amongst the lower courts as to the method of exercising and the limits upon judicial power on motion for n.o.v.—illustrated by the clear conflict between the decisions below and that of the Court of Appeals for the Second Circuit in *Banks* v. *Central Hudson Gas Electric Corp.*, 224 F.2d 631 (1955) decided under like substantive law and facts—requires that this Court rearticulate the constitutional dichotomy of functions between judges and juries and the *modus operandi* for maintaining that dichotomy so as to preserve the jury's exclusive power to select the evidence to be considered in arriving at a verdict.

STATEMENT OF THE CASE

A. Proceedings Below

This is a negligence action, jurisdictionally founded on diversity of citizenship, for injuries and death on a street construction job in Wheaton, Maryland, a suburb of Washington, D. C. Men working in the street with a crane in placing a cement finishing machine were electrocuted when the boom, fixed in a position 30 inches from one of Pepco's 33,000 volt wires became energized.

The critical factual issues in a long jury trial in the United States District Court for the District of Maryland were: (1) Should Pepco have realized that a crane would or might be used on the job about which it had been informed, and; (2) Should Pepco have anticipated the possibility that unless it warned the construction people that one set of the wires on the street was high tension, a crane, if used, might get too close to these particular wires and thereby endanger the workmen. While not printed in the record, the trial court fully and properly charged the jury as to the scope and limits of a power company's duty with respect to such wires, including a charge, requested by the defendant, that it need not anticipate every possible fortuitous circumstance (thereby adopting the Maryland and the universal rule, as stated in *LeVonas v. Acme Paper Board Co.*, 184 Md. 16, 40 A. 2d 43 (1944) and other decisions cited in both opinions below).

After verdicts for plaintiffs, defendant filed alternative motions for judgment n.o.v. or for a new trial. Taking the motions under advisement for almost four months the trial court granted the motion for judgment n.o.v. (opinion, I TR 2-20), but did not then rule on the motion for new trial. In a subsequent memorandum and order (of September 24, 1958), it overruled that motion. 165 F. Supp. 486. Upon appeal by plaintiffs to the United States Court of Appeals for the Fourth Circuit, briefs were

submitted, argument had and after almost five months that court affirmed. This petition followed.

B. The Evidence

Recognizing the established judicial power to withdraw a case from a jury (or grant n.o.v.) when there is truly *no* issue of fact for its determination, petitioners most earnestly contend that in the exercise of that power the courts below have overstepped their constitutional limitations in the method employed to ascertain the existence or non-existence of such an issue of fact.

Demonstration of that error—to show that it was one of method and not merely a tolerable difference in the conclusion of fact—unfortunately requires an extensive comparison of the evidence, inferences and factors of human experience which the courts below selected for consideration as contrasted with that available to and upon which the jury may properly have relied. With the Court's indulgence, therefore, we incorporate herein by reference the evidence considered by the District Court (I TR 3-8, 163 F. Supp. at 673), that which the Court of Appeals considered (II TR 2-7, App. *infra* pp. 2a-6a) and the substantial body of evidence summarized in our brief below (pp. 4-14, nine copies of which have been lodged with the Clerk of this Court) which neither court below considered.

REASONS FOR GRANTING THE WRIT

I

THE METHOD EMPLOYED BELOW ON N.O.V. TO TEST THE EXISTENCE OF A FACTUAL ISSUE CONSTITUTED A GROSS INVASION OF THE JURY'S EXCLUSIVE POWER TO SELECT THE PARTICULAR EVIDENCE, INFERENCES AND CONCEPTS OF HUMAN EXPERIENCE UPON WHICH TO RELY IN RESOLVING THE ISSUES OF FACT AND TO REJECT THOSE INCOMPATIBLE.

Wholly apart from its impact upon the injured workmen and the kin of the workmen killed, as well as its far-reaching effects upon the practices of electric power companies to protect the public from dangerous electric wires, the decision below is another shocking modern example of the confusion and error that persists as to the extent of judicial power to review jury verdicts.

In the method employed to test the legal sufficiency of the verdict, the courts below obscured the established historical distinction between, on the one hand, judicial power to avoid seemingly unfair verdicts by granting a motion for new trial and, on the other hand, the distinct and far more limited power to remove a case entirely from jury consideration, by directed verdict or n.o.v., because of the complete absence of any disputed factual consideration. In granting the motion for judgment n.o.v. the District Court, with Court of Appeals' approval, engaged in a process of gerrymandering through the evidentiary record and selecting that evidence, those inferences, and those factors of ordinary experience which it deemed appropriate for consideration in ascertaining the existence of a factual issue for the jury. Thus the error lay not merely in a permissible difference as to what the facts were, but rather in the gross encroachment upon the very essence of the

[3] The extended time required by both courts below to decide this case is some, though we realize not necessarily weighty, indication that the alleged absence of any issue of fact for the jury is not so clear as the opinions would indicate.

jury function, the process of selecting the evidence and inferences to be relied upon and, for whatever reason, not subject to judicial re-examination, discarding all others. *Tiernan* v. *Peoria & Pekin Union R. Co.*, 321 U.S. 29, 35 (1944); *Lavender* v. *Kurn*, 327 U.S. 645, 652 (1946).

Comparison of the statements of fact in the opinions below with that in our brief in the Court of Appeals demonstrates that both courts below, in disposing of the case as a matter of law, ignored the following substantial evidence supporting the verdict: (1) That the method adopted by the construction crew on the fatal day was not only the most efficient, but also the approved way to start the construction work (Point 1, p. 4, Statement of Facts, brief below); (2) That electric power lines, all similarly strung, were a factor the entire length of this 1½ block paving job, and not merely at the particular point where the accident occurred, and that regardless where the paving had commenced a crane might have been required for use at the place where the accident occurred (Point 2, pp. 5-6, Statement of Facts in brief below); (3) That the construction people, and certainly untutored Portuguese and Negro common laborers, could not be expected to distinguish high and low tension wires (Point 3, pp. 6-7, Statement of Facts in brief below); (4) That by reason of its own prior unfortunate experience with negligent crane operators Pepco should have anticipated difficulties where a crane was being used (Point 4, pp. 7-8, Statement of Facts in brief below); (5) That the care exercised by persons in the vicinity of electric wires depends upon their knowledge as to the amount of voltage carried (Point 5, p. 8, Statement of Facts in brief below); (6) That Pepco lacked any safety program whatsoever to guard against possible injury to the public from its power lines (Point 6, pp. 9-14, Statement of Facts in brief below).

The jury was fully and properly instructed on all the applicable principles of law, including that exculpating

power companies for wholly fortuitous circumstances, and presumably fulfilled its constitutional function in the light of this controlling law. Upon review of the sufficiency of the evidence to support that verdict, it was, therefore, constitutionally improper for the courts below to have ignored such a multitude of evidence and factors of human experience upon the basis of which the jury may have properly concluded that the circumstances were not so fortuitous as to have precluded the power company from foreseeing the hazard which, in the absence of warning, might eventuate in an accident as it did here.[4] That the jury could have so reasonably concluded can be syllogistically summarized as follows:

1. The degree of care a person exercises in given circumstances is normally in proportion to the known risk. Pepco must be assumed to know this human characteristic. A.L.I., *Restatement of the Law of Torts*, Vol. 2, 1290. Thus, Pepco knew: (a) that persons would normally act with far greater care when working near known high tension lines than they would near domestic service lines, and; (b) that, therefore, the workmen on the paving job would act with far more care in the vicinity of Pepco's high tension line *if* informed of the voltage.

2. Pepco's own internal practices demonstrate that the degree of care required in the vicinity of high tension lines is far greater because of the greater danger with higher voltages. The uncontradicted testimony of the crane operator that he never came closer to the wires in question than 30 inches vividly demonstrates that the possibility of the current arcing from a wire to the boom of a crane is greater.

[4] Thus distinguishing *LeVonas* v. *Atemi Paper Board*, *supra*, p. 4 and like cases where there was not the remotest opportunity for the power company to anticipate hazard from use of a crane because there was absolutely nothing to indicate the power company had or should have had any idea that work was being done let alone that it might entail use of a crane.

and thus, the danger greater, as the amount of voltage in the line increases.

3. This was not a situation where the only electric wires to be considered were those crossing at the north end of Fern Street where the accident happened. Electric wires bordered the entire west side of the street. Thus, wherever the crane was used, it would always be in the near vicinity (10-20 feet) of one of defendant's electric wires.

4. Even the testimony of Pepco employees unequivocally established that any ordinary layman could not tell with the naked eye whether a particular wire carried high or low voltage or what its voltage was.

5. Consequently, Pepco should have known that the construction people, in deciding where to position the crane, would have no reason to appreciate it would be any more dangerous nearer one wire than any other or that a particular wire was higher voltage than house currents. *Cf., Interstate Power Co.* v. *Thomas*, 51 F. 2d. 964, 970 (C.A. 8, 1931).

6. The most logical and efficient way to perform this job was to start paving the first strip from the north end as was done. Even assuming the job could have been started elsewhere, it was likely the crane would be required to handle the paving machine at the north end of the street somewhere near the high tension line in question, either to take the concrete paving machine off one set of rails and place it on another or to take it off the rails for adjustment purposes.

Considerations in the field may not permit a piece of working equipment to be placed exactly as visualized *ex post facto* from a blueprint. And, where there is a very high duty of care to anticipate possible danger from lethal wires which may not be recognized as such, foresight should include the real possibility that others do not always act with blueprint precision. Foresight on Pepco's part in

blueprinting possible risk required that it allow a margin of safety for the ignorance or carelessness of the construction people (particularly with its prior experiences with careless crane operators) and advise them of the dangers from certain of its wires which were high tension if they should depart from any safe blueprint placement of working equipment.[5]

7. Thus Pepco should have foreseen that in the absence of warning that the wire carried 33,000 volts, the construction people might select the particular point which was selected for the crane to start the job and that the crane operator, who was of a class known by Pepco sometimes to be careless so as to get fouled up with electric wires, might get closer to the high voltage wire than was safe or was less than the safe working tolerances for the particular voltage established and insisted upon by Pepco for its own workmen.

In precluding the jury from considering the foregoing matters, the courts below took from the jury that hard to define but most important function of evaluating the "incommensurables" which Judge Learned Hand spoke of in *Conway* v. *O'Brien*, 111 F. 2d. 611, 612 (C.A. 2, 1940) where, in analyzing the degree of care required in any particular situation, he said:

> "The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid

[5] "The foresight to be employed may depend in particular cases upon the voltage transmitted over the wire in question" *Smith* v. *Appalachian Electric Power Co.*, 74 F.2d 647, 651 (C.A. 4, 1935). *Cf.*, *State, use of Bahner* v. *Consolidated Gas Elec. Co.*, 159 Md. 138, 143, 150 A. 452, 455 (1930) that: "In proportion to the voltage the [power company] might be required to exercise greater care and provide more adequate safeguards for those whose business or rights might expose them to danger."

the risk. All these are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically. For this reason a solution always involves some preference, or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied."

The usurpation of the jury's constitutional function is evident in the language of the Court of Appeals opinion which in a pivotal conclusion states (II TR 6, App. *infra* p. 6a, *emphasis supplied*):

> "Pepco had a right to assume that a construction company and its construction crew would not *intentionally foul* its power line without a glance at the immediately adjacent pole and the insulators which carried the wires, the substation into which they led, or the area, without apparent domestic demand from this line, along its route, all of which *shouted* the fact of high voltage."

There is absolutely nothing in the record to suggest the crane operator "intentionally" fouled the fatal wire. And what does the Court of Appeals mean when it uses the word "foul"? The implication to an unwitting reader, not otherwise clarified, is that the boom actually touched the power line. The fact is that the testimony of the crane operator that the boom was fixed, locked firmly in position, 30 inches from the wire, when the current arced (I TR 102, 106, 108, 109-110) stands absolutely uncontradicted. The jury could have concluded that in the absence of a warning that the wire was 33,000 volts a crane operator might feel safe in this situation because, as the evidence showed, in similar circumstances where the wire was not high tension no arcing would be anticipated. (The testimony from Pepco officials and employees uniformly showed that working distances from wires is to be increased as the voltage increases.)

Does a fair reconciliation of judicial power with the constitutional assurance of a jury trial permit a court to blithely ignore the fact that the boom was 30 inches from the wire and assert that the wire was intentionally fouled? Does it permit the judicial reviewer to emphasize the existence of a nearby electric power substation, the size and number of insulators on the wire where it joined with the pole and the apparent lack of demand for lower domestic voltages and describe these as having "shouted" the fact of high voltage and at the same time ignore a mass of evidence which minimized each of these alleged determinative evidentiary matters. For example, the evidence showed that the substation on Fern Street was so designed as to appear like many a warehouse or office structure and not like a power station, that it had no patently identifying signs or other indicia that it was a power substation and that the limited transformers on its roof were visible only from certain angles and might be overlooked. See, e.g., Pl. Exs. 1B, 1D, 1H.[8] Even assuming, a layman might nevertheless have realized that this was an electric power substation, the height, size, etc., of the wire running from the substation to the wooden pole from which in turn ran the wire which caused the accident was such that many, if not most laymen, would not necessarily appreciate it was high tension. See, e.g., Pl. Exs. 1A, 1C, 1D. Moreover, the court below apparently overlooks that the insulators were no different in size and general appearance than people see everyday on wires which run down residential streets and into their homes, and that it is questionable whether the fact known to Pepco employees that the number of insulators is governed by the amount of voltage (II TR 7, App. *infra* p. 5a) would be known to the ordinary man on the street.

The same can be said as to the assertions that "the testimony discloses nothing in the area which could have been

[8] One copy of the bound volume of exhibits below has also been lodged with the Clerk of this Court.

mistaken for a domestic or commercial service line coming from this power line," the reference to the lack of "apparent domestic demand" and the reference to "the fact that such domestic current must be taken down from moderately high voltages by transformers not far distant from the loads" (II TR 6, App. *infra* pp. 5a-6a). Is the Court of Appeals concluding that a jury could not fairly assume, on the basis of *its* experience and knowledge, that laymen may not know of the latter fact of electrical distribution and that, therefore, laymen would not realize this is not a domestic service wire? Moreover where the testimony affirmatively showed, as Pepco knew (I TR 51-52, 129-130), that the Wheaton area was rapidly expanding, commercially and residentially, is the Court of Appeals concluding that even without evidentiary specification as to the proximity of houses or stores to this particular street, a jury *must* find that a "reasonably informed amateur" should have known that these could not possibly be domestic service lines and that, therefore, Pepco had a *right* to assume these laymen would so realize? Is the Court of Appeals concluding that courts can take judicial knowledge, foreclosing a *jury from* otherwise concluding, that laymen should know that such an area could not possibly be served by domestic service lines originating as such at a substation and carried down or across one particular street which itself did not have houses?

Apt illustration of this imposition of judicial sophistication upon the lay reasoning processes of a jury is indicated by the very language of the Court of Appeals opinion. For example, in contrasting high tension lines with those carrying 110 or 220 volts, the Court of Appeals refers to the latter as "domestic service lines" (II TR 8, App. *infra* p. 6a). The term "domestic" nowhere appears in the record or briefs below although it is apparently a word of art in the electrical utility industry to describe such currents. Its use by the Court of Appeals is indicative of judicial knowledge and sophistication about electrical mat-

ters improperly applied in reviewing the sufficiency of evidence from the viewpoint of a reasonable but less well informed juror attempting to ascertain what the ordinary man on the street would think.

In many other respects, the Court of Appeals opinion illustrates the usurpation of the critical jury function of culling the evidence.[7] The court says that: "The crane operator had previous experience with crane booms fouling electric lines" (II TR 7, App. *infra* p. 5a), ignoring the evidence that Pepco also had unfortunate experiences with other crane operators who carelessly fouled electric lines upon the basis of which the jury might fairly have concluded that Pepco should have anticipated possible trouble because reasonable men ". . . must . . . take life as it is and not as it should be and must realize the likelihood that third persons may act in a variety of ways, all of which are not only morally but legally wrongful" A.L.I., *Restatement of the Law of Torts*, Vol. 2, §290, p. 783. The court asserts that "credulity is strained" by the testimony of a Slick official that he thought these were domestic current wires, but then goes on to say this is of no importance because Pepco had the *right* to assume the crew would not intentionally foul the power line without a glance at the surroundings which "shouted" high voltage (II TR 8, App. *infra* p. 6a). Constitutional departure in the judicial appraisal of credibility is not cured by the assertion that this is of no importance when it is apparent the court relied upon its appraisal of a lack of credibility in the testimony of all the persons involved that they did not know this was high voltage.

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[7] The court, for example, throws some doubt on the conclusion that there was evidence upon the basis of which it was fair to conclude Pepco knew or should have known a crane was to be used on this job, impliedly stating that in reaching this conclusion the District Court relied only on a notation on a set of plans that a concrete paving machine would be used (II TR 5-6, II. App. *infra* pp. 3a, 8a). In fact, as itemized in our brief below (fn. 3 p. 3), there was considerable other evidence supporting this conclusion.

Thus, it was only by a process of selectivity in the evidence considered, in effect assuming the fact to be decided, that the courts below concluded the case was one of fortuitous circumstances exculpating the power company. The grave constitutional error derives not so much from the circumstance that given evidence may commend itself differently to different men's reason, but rather from the method of selecting the evidence to be considered in making the evaluation whether the jury verdict was supportable.

II

EXERCISE OF THIS COURT'S SUPERVISORY JURISDICTION IS URGENTLY REQUIRED TO ASSURE CONSISTENT AND CONSTITUTIONALLY PROPER SELF-RESTRAINT BY LOWER COURTS IN THE REVIEW OF VERDICTS.

A. The Decisions Below Are Clearly in Conflict With That of the Second Circuit Decided on Comparable Law and Facts.

Without any elaborate analysis of the evidence, it patently appears that the decision of the Fourth Circuit in this case is in conflict with that of the Second Circuit in *Banks* v. *Central Hudson Gas Electric Corp.*, 224 F. 2d. 631 (1955), as to whether evidence is sufficient to sustain a verdict or whether the case may be disposed of as a matter of law. *Banks*, which reached a contrary result, was decided on substantially similar factual conditions and under essentially identical principles of substantive law as to the duty of power companies.* There, a power company, aware of the construction of a building on the west side of a street which required use of heavy machinery, including a 40-foot crane, moved its 13,800 volt line to the east side of the street some 50 to 60 feet away, the power line being strung on poles 40 feet above the street and approximately 20 feet

* While *Banks* was decided under New York law and the instant case under Maryland law, the Court will observe that the opinion below cites cases from many jurisdictions on the principle of substantive law, including some from New York (II TR 9-10; App. *infra* pp. 7a, 10a).

above minimum prescribed height. The wires were uninsulated and although insulation would have prevented the accident neither industrial practice nor government regulations required insulation. The power company never advised the contractor or any of its workmen that the wires were uninsulated and carried high voltage, nor did it post warning signs, etc., but one of its engineers had observed to the owner of the building that the lines were high tension and that the crane ought not to get too close. A workman was injured when the boom of the crane contacted the power line while the crane was being used, across the street from the building under construction and in proximity with the wires, to move certain heavy metal blocks which, *unknown* to the power company, had been accumulated by the contractor at that point.

In affirming the judgment against the power company, where it was argued that the verdict was against the weight of the evidence, the Second Circuit held:

> "The evidence clearly indicates that to facilitate the construction Central moved its wires across the street and maintained them at a height twice that required by regulations. It argues that under the law this was the full measure of its duty, and, having discharged that duty, there was no basis on which the jury could find that it was negligent. But Central fails to appreciate the extent of its legal obligation to a person in the situation of plaintiff. The trial judge charged the jury that Central could be held negligent if it breached its duty to warn the plaintiff and his fellow employees of the hazard of injury inherent in the overhead wires. Central protests that this was erroneous, contending that it had no duty to give warnings in the absence of notice that metal blocks were being stored under its wires. This contention is untenable [citing cases]. The thrust of these decisions is such that Central's knowledge that construction was under way which involved the use of a crane gave rise to a duty on its part to take reasonable precautions to prevent harm from its wires.' And a jury might have found that the posting

> of warning signs was at least a part of that duty [citing cases]. . . .
>
> "We think that Central was under a duty to warn the plaintiff. The record is replete with evidence sustaining the jury verdict that Central breached this duty and that its failure was a proximate cause of plaintiff's harm. Hence, Central could properly be held liable for the injuries sustained by the plaintiff."

The gross difference in the philosophic approach to the judicial function in examination of jury verdicts is such that no amount of sophisticated linguistics can disguise. In *Banks*, as contrasted with the approach below, it is clear that the Second Circuit must have been of the view that notwithstanding the external physical characteristics of high tension lines and that the lines in question were restrung by the power company further distant from the job site than here, notwithstanding the power company did not know work was to be done under their wires, etc., it was peculiarly a function of the jury as part of its consideration and resolution of the "incommensurables" of a negligence case to ascertain from its outlook, not a judicial outlook, whether the ordinary workmen would realize the danger and whether the power company should issue a warning rather than making assumptions as to what the workmen might realize. This is no mere disagreement of fact; it reflects a basic conceptual difference as to the judicial function. Some courts are of the view that the constitutional assurances of a jury trial preclude judicial reappraisal of the facets of human experience already determined by a jury; other courts are of the view that evidence, upon judicial review of a verdict, can be viewed through the eyes of judges with wholly different intellectual attainments, experience and aptitudes than those of the jury.

This Court in *Dick* v. *New York Life Ins. Co.*, ... U.S. ....., 3 L. ed. 2d 935, 941 (1959), observed that:

> "Lurking in this case is the question whether it is possible to apply a state or federal test of sufficiency

of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement."

Perhaps as one facet of this problem is the question whether all federal courts are to be required to use the same method in approaching the evidentiary record and in determining what portions thereof to use in determining whether, as a matter of law, the verdict can stand.

B. The Volume of Litigation Involving Judicial Review of the Sufficiency of Evidence in Cases Where Different Views May Be Taken of the Facts, and the Modern Judicial Tendency to Assume Powers Traditionally and Constitutionally Exercised Solely by the Jury Requires a Rearticulated Guide for Judicial Exercise of the Power to Take a Case from the Jury As Contrasted with the Power to Order a New Trial.

The method followed in reaching the result below and the startling contrast with the approach taken by the Second Circuit in *Banks* strikingly illustrate the need for a clear contemporary articulation reconciling judicial power to review verdicts with the constitutional requirement of the Seventh Amendment. More particularly, it reflects the need for delineation of the judicial power on motion for directed verdict (or n.o.v.) as compared to greater judicial latitude on motion for new trial.

That the judicial process, and particularly the appellate process, has become so encumbered with endless determinations of these fact situations is in large measure due to the confusing history of judicial treatment of the power to review jury verdicts and the ever increasing encroachment by the judiciary upon the realm of fact constitutionally assigned to the jury. If in time to come commentaries shall have occasion to expound on the rise and fall of the jury system in civil cases, its requiem may well be said to have been foreshadowed by the creation and expansion of the directed verdict power the consequences of which were so

forcefully stated by Mr. Justice Black in his dissent in *Galloway* v. *United States*, 319 U.S. 372, 396 et seq. (1943).

The first decisions of this Court giving recognition to the device of a directed verdict (*Parks* v. *Ross*, 11 How. (U.S.) 362 (1850), and *Pleasants* v. *Fant*, 22 Wall (U.S.) 116 (1874)), apparently conceived of it as merely a procedural development which did not alter or enlarge the substance or scope of the judicial power previously exercised upon a demurrer to the evidence. That power, as expressed in *Pleasants* v. *Fant*, was exercised upon a concession by the moving party admitting the truth of the testimony to which he demurred and all those conclusions of fact which a jury might fairly draw from that testimony. While forced and violent inferences were not admitted, the testimony was to be taken "most strongly" against the moving party. ". . . there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it . . ." and, in so deciding, the question for the Court is " Not whether on all the evidence the preponderating weight is in his [the moving party's] favor; that is the business of the jury, but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is sufficient to justify a verdict?"

In *Gunning* v. *Cooley*, 281 U.S. 90 (1930), this Court apparently confirmed the limited judicial power on motion for directed verdict (or n.o.v.), re-confirmed the exclusive province of the jury to resolve issues of credibility and the effect or weight of evidence and inferences to be deduced therefrom (281 U.S. at 94), and ostensibly merely reaffirmed that a mere scintilla of evidence was insufficient to support a jury verdict. But in *Gunning*, the Court appears to have opened the door to broadened judicial power upon review in stating that "Where the evidence upon any issue is on all or one side or so overwhelmingly on one side as to

leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury" and that "When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither." 281 U.S. at 94. Thus the Court raised the specter of taking from the jury the exclussive power to select the evidence and inferences to be relied upon and discard all else, for otherwise a court would not be permitted, to determine whether evidence is overwhelmingly one way or another nor would it ever reach the question whether evidence is consistent with conflicting hypotheses. If the jury has the sole power of selection of the particular evidence and inferences to be relied upon, the reviewing judicial eye would never be given the opportunity of making the contrast suggested in *Gunning* v. *Cooley*.

The turning point in the expansion of judicial power to review verdicts appears to have been this Court's decision in *Galloway* v. *United States*, 319 U.S. 372. As we understand it, insofar as is here pertinent, the majority opinion there held that the Seventh Amendment preserved only the substantive right to jury trial and did not preclude the development of new procedural devices. The Court concluded that a motion for directed verdict was not only within a court's power to consider, but that the moving party was not required by his motion to waive the right to have the case considered on the merits of all of the evidence in the event he lost his motion. Dissenting, Mr. Justice Black documented the decline of the jury system, *inter alia*, by recognition of the procedural device of a directed verdict and the expansion of the scope of the judicial review thereunder, and he noted that the majority of the Court had itself weighed conflicting evidence in order to determine whether claims could be disposed of as a matter of law.

The difficulties occasioned by the new device of a directed verdict and the fact that the scope of judicial power to

dispose of factual disputes as a matter of law was thereby unwittingly enlarged in an area where, because judges themselves can disagree, the jury should be supreme, are well illustrated by the differences in the approach to the facts taken by the majority and dissenting opinions in *Galloway*. The critical factual issue was whether a man became permanently disabled while in military service. The majority found a gap in plaintiff's proof warranting direction of a verdict because there was an unexplained period of years after military service during which there was no showing, one way or the other, whether the man was then continuously disabled. The dissent, on the other hand, found in the record adequate evidence of permanent disability having set in before this unexplained period of years began.

Human limitations, of course, make it impossible to ascertain what the fact as to disability truly was in *Galloway*. But with all due deference to the bench, it seems incredible that a verdict may be voided as a matter of law because it is deemed irrational—which is the conclusion in *Galloway* and like cases no matter the language used to describe it—when the factual conclusion upon which the verdict stands commends itself to another judge's reason. And yet that is the necessary result of the process by which judges have injected themselves into the fact finding realm of the jury only to thereby create a large area of potential disagreement between judges themselves...

Perhaps the dangers were foreseen in *Tennant* v. *Peoria Union Ry. Co.*, 321 U.S. 29, 35 (1944), where this Court, in a seemingly more restrictive approach to judicial review of verdicts, stated that the very essence of the jury function was that of selecting the evidence to be relied upon in resolving the factual issue. And in *Lavender* v. *Kurn*, 327 U.S. 645, 652 (1946), the Court held that once it was ascertained that there was evidence upon which an inference of negligence could be drawn all opposing evidence became

irrelevant. The Court held there that a jury verdict could be overturned for insufficiency of evidence "Only when there is a complete absence of probative facts to support the conclusion reached" by the jury, and that in reaching its conclusion "the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. 327 U.S. at 653.

In *Wilkerson* v. *McCarthy*, 336 U.S. 53, 57 (1949), reversing an intermediate appellate decision which had found the evidence insufficient to support a verdict, Mr. Justice Black, who had written the dissenting opinion in *Galloway*, wrote the majority opinion holding that:

> "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

However, in a concurring opinion, Mr. Justice Frankfurter asserted (336 U.S. at 65) that:

> ". . . it is the trial judge's function to determine whether the evidence in its entirety would rationally support a verdict for the plaintiff . . ."

That concurring opinion then went on to observe (336 U.S. at 65) that:

> ". . . since questions of negligence are questions of degree, often very nice differences of degree, judges of competence and conscience, have in the past, and will in the future, disagree as to whether proof in a case is sufficient to demand submission to the jury."

Mr. Justice Frankfurter concluded that the time of the Supreme Court ought not to be burdened with consideration of these purely factual situations already reviewed by two lower courts. In a second concurring opinion, Mr. Justice Douglas stated that "Judges will not always agree as

to what facts are necessary to establish negligence. We are not in agreement in all cases." 336 U.S. at 69. To corroborate the views of Justices Frankfurter and Douglas that even judges of this Court can disagree on where the facts in a negligence case should lead, Chief Justice Vinson dissented in *Wilkerson* because, in his view, there was insufficient evidence to warrant a verdict for the plaintiff. In a separate, dissenting opinion arriving at the same conclusion, Mr. Justice Jackson stated: "Determination of whether there should be such a basis [insufficient evidence for the jury to consider] is a function of the trial court, even though it involves weighing evidence and examining facts." 336 U.S. at 75.

The uncertainty thus created as to the scope and method of review of a jury verdict to determine the sufficiency of evidence—whether the reviewing judge or judges look at all the evidence or only the plaintiff's evidence or only that part of the evidence favoring the plaintiff whether in plaintiff's or defendant's case) or whether if there is an evidentiary basis the reviewing court must presume the jury discarded or disbelieved all other evidence or whether evidence can be weighed, etc.—was further compounded by the several different views more recently expressed in a series of F.E.L.A. cases decided in this Court in the October Term, 1956, *Rogers* v. *Mo. P. R. Co.* and other cases, 352 U.S. 500, et seq.

In the majority opinion in *Rogers*, reversing a State Supreme Court decision concluding that the evidence did not support a plaintiff's verdict, Mr. Justice Brennan, after reviewing the facts, stated: "At best, uncertainty as to the fact arises from the petitioner's testimony and in that circumstance not the court, but the jury, was the tribunal to determine the fact" (352 U.S. at 504), a view apparently inconsistent with the expression in *Gunning* v. *Cooley* that if the plaintiff's evidence is consistent both with the hypothesis of negligence and with the absence of negligence a

verdict should be directed. The majority opinion in *Rogers* went on to say (352 U.S. at 507) that:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death . . . whether or not the evidence allows the jury a choice of other probabilities."

The majority opinion concluded that "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." 352 U.S. at 510. In *Rogers*, Mr. Justice Burton concurred in the result, Mr. Justice Reed stated he would affirm the state court judgment and Justices Frankfurter and Harlan wrote dissenting opinions applicable to the entire group of F.E.L.A. cases then being considered.

In one of the companion cases, *Webb* v. *Illinois C. R. Co.*, 352 U.S. 512, 513-514, Mr. Justice Brennan, in the majority opinion, stated:

> "In passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."

Concurring in *Herdman* v. *Pa. R. Co.*, 352 U.S. 518, and dissenting in the other three F.E.L.A. cases then under consideration by the Court, Mr. Justice Harlan noted his agreement with Mr. Justice Frankfurter's criticism of the Court's recurring willingness to grant certiorari in cases of this type (352 U.S. at 559) and then went on to say (352 U.S. at 563-4) that:

> "No scientific or precise yardstick can be devised to test the sufficiency of the evidence in a negligence case. . . It has, however, been common ground that a ver-

> dict must be based on evidence—not on a scintilla of evidence but evidence sufficient to enable a *reasoning* man to infer both negligence and causation by *reasoning from the evidence.*"

In a separate dissenting opinion, Mr. Justice Frankfurter criticized the grant of certiorari in such cases because in his view the problems involved were of interest only to the particular litigants and not national problems of sufficient public interest and stature to warrant the Court's time. Mr. Justice Frankfurter went on to say (352 U.S. at 545) that:

> "It is impossible to read the 106 written opinions of the Supreme Court dealing with this type of issue . . . without feeling that during different periods the Court, while using the same generalities in speaking about the relation of judge and jury to the cause of action for negligence, has applied those principles differently from time to time to the facts of different cases. The divided views of this Court today with respect to the application of those principles merely reflect the divided views of State and Federal judges throughout the country on problems of negligence. As long as there is a division of functions between judge and jury, there will be division of opinion concerning the correctness of trial judges' actions in individual cases."

The scope of judicial power on the review of a jury verdict was not necessarily clarified in one of the last pronouncements by this Court in *Dick* v. *New York Life Ins. Company*, ... U.S. ....., 3 L. Ed. 2d 935 (decided May 18, 1959), which involved the review of a Court of Appeals decision reversing a jury verdict granting recovery under an insurance policy for accidental death. The Eighth Circuit had reviewed the total evidence in the case and, after referring to that from which it might have been inferred that the decedent did not have suicide in mind, concluded that certain scientific testimony with respect to the gun in question could not be reconciled with any reasonable theory

of accident. This Court, in the majority opinion written by Mr. Chief Justice Warren, reviewed the evidence and the Court of Appeals analysis thereof and then stated that the Court of Appeals

> ". . . committed its basic error in resolving a factual dispute in favor of respondent that the shotgun would not fire unless someone or something pulled the triggers. Petitioner's evidence on this score, despite the 'tests' performed by the sheriff, could support a jury conclusion that the gun might have fired accidentally from other causes. Once an accidental discharge is possible, a jury could rationally conceive of a number of explanations of accidental death which were consistent with evidence which the jury might well have believed showing the overwhelming improbability of suicide."

The Court then referred to evidence indicating that the decedent was happy, secure, had made various appointments, etc., all of which inferred no suicide. The majority opinion *appears* to have held that if there was evidence of a non-scientific nature which supported claimant's conclusion of accidental death the jury had a right to believe and rely upon this evidence and discard the irreconcilable but seemingly powerful scientific proof.

Thus, the *Dick* case would appear to stand for the proposition that in reviewing the sufficiency of evidence to sustain a jury verdict the reviewing court can look only to that evidence tending to support the claim and must put blinders on and consider irrelevant all other evidence even though it would seem to foreclose the claim. However, this was not so articulated in the opinion and the very fact that the Court discussed the evidence pro and con might give some comfort to those who contend that in reviewing the sufficiency of evidence a court can look to and consider *all* the evidence rather than merely that which may support the claim.

In a dissenting opinion in *Dick* in which Mr. Justice Whittaker joined, Mr. Justice Frankfurter stated (3 L. Ed. at 947):

> "If this case raises a question under the Seventh Amendment, so does every granted motion for dismissal of a complaint calling for trial by jury, every direction of verdict, every judgment notwithstanding the verdict. Fabulous inflation cannot turn these conventional motions turning on appreciation of evidence into constitutional issues, nor can the many diversity cases sought to be brought here on contested questions of evidentiary weight be similarly transformed by insisting before this Court that the Constitution has been violated."

And the dissenting opinion has a footnote (No. 28, 3 L. Ed. at 947) pointing out that "Negligence litigation occupies a substantial portion of the time of federal district judges" referring to one District Judge's calculation that half his time was so occupied. Later, Mr. Justice Frankfurter again states that there are no special or important reasons for this Court considering such cases "especially when the decision turns solely on a view of conflicting evidence" (3 L. Ed. at 948), indicating that in the minds of some of the members of this Court the scope of judicial review of a jury verdict permits the reviewing judge to look to the entire evidence in the case and weigh it upon motion for directed verdict or judgment n.o.v.

Serious question arises, therefore, as to the governing *modus operandi* for lower courts in approaching jury verdicts. Clear resolution of that question, particularly as it affects the large number of negligence cases handled by the federal courts where the prime issue of fact is one upon which even judges will disagree, is essential. This is so because: (1) there has been a continuous and continuing erosion of the former exclusive province of the jury to select the evidence, the inferences and the factors of human experience to be considered in reaching the ultimate con-

clusion of fact and disregarding all others, no matter how persuasive, as irrelevant; (2) many judges persistently exercise the prerogative of evaluating those "incommensurables" which, as Judge Learned Hand so aptly stated, are constitutionally assigned to the jury's consideration; (3) the decisions of this Court have not furnished a clear and constant standard for the lower court judges in fulfilling their function of review of jury verdicts; (4) the continuing interference by the lower courts with the jury verdict has largely obscured the difference between, approach to and consequences of the motion for directed verdict and judgment n.o.v. on the one hand and the motion for new trial on the other, and; (5) the increasing frequency of the problem is due in large part to the fact that judges continue to usurp the exclusive jury function of selecting the evidence, inferences and factors of human experience to be considered in arriving at the ultimate conclusion of fact and have thereby enlarged the potential area of disagreement between judges themselves as to the sufficiency of the evidence to support a verdict.

Thus it is evident that the lower federal courts are not guided by one single consistent controlling philosophy and set of standards in reviewing the sufficiency of the evidence to sustain jury verdicts and that the need for a re-appraisal and rearticulation of the requisite constitutional philosophy and standards cannot be obscured by labeling the situation as merely one where there is a normal expectancy of differences in views of the facts. Nor can the issue be avoided, as below, on the basis that there is no constitutional issue unless judges are shown to be indifferent to the established basis of allocation of powers between judges and jury. Experience shows that the variation in technique among the lower courts results from the absence of one single, clearly recognizable and articulated "established basis" by which all are guided.

The performance of the judicial function of reviewing of a verdict is difficult at best because whatever the process

scope of the reviewing power on demurrer, on motion for directed verdict, or upon n.o.v., it requires judges to ascertain the potential reasonableness of an inference or conclusion of fact from the outlook of a reasonable juror even though the particular inference or conclusion does not commend itself to the judge's own reason. Where, because of the lack of clear, consistent standards, judges inject themselves into the jury's realm of selecting the evidence, the inferences and the factors of human experience against which to test the propriety of the verdict, the judicial problem and the potential area of disagreement between judges becomes enlarged. And the problem becomes compounded where judicial sophistication and intellect is permitted to discard as not potentially reasonable that which to the normal level of intellect and experience of a juror is reasonable. In this very case, the difference becomes apparent when the court below concluded, and thereby precluded any verdict from being based on any contrary conclusion, that any reasonably informed amateur would in the total circumstances have realized that the particular electric wire was high tension whereas, as we earnestly believe we have shown, there is grave doubt whether the average man on the street as viewed through a juror's eye would have any such appreciation.

That the process by which the fact finding functions of the jury have been impaired has been a gradual one makes it the more insidious. Mr. Justice Clark recently aptly noted in an address on Law Day 1959 that:

> "Twenty-one times in the history of humanity the 'climate' of civilizations has changed. Many rose to great heights and then decayed into the land of the forgotten. But history shows that the change was so gradual that no one then living hardly realized it."[9]

[9] Reported in Federal Bar News, Vol. 6, No. 6, p. 175 (June, 1959).

Mr. Justice Clark concluded that history therefore teaches the necessity of active dedication to the rule of law upon which our society is predicated and of eternal vigilance against its breach. Since the jury system is an integral part, indeed perhaps the most vital part, of our rule of law and an indispensable complement to the democratic process, it might well also be said that eternal vigilance is required to prevent subtle erosion of the jury system that in time will bring about its demise in fact if not in form. Should that process unfortunately be permitted to continue, the future historian may well, from his detached point of vantage, contrast the jury envisioned by the constitutional framers—a jury effectuating the democratic process by imprinting on its findings of fact the experiences and reason of a cross-section of the community—and the emasculated modern civil jury whose thought and fact finding processes have been sterilized of the common touch by the injection of judicial views developed from experience and intellect often far removed from that of the jury's or the litigant's whose conduct is being tested.

We respectfully but urgently submit, therefore, that this process of erosion must be reversed by redefining the standards and methods for judicial review of jury verdicts. There would be no need at this stage to attack the legitimacy of the procedural successors to the demurrer to the evidence nor to eliminate the now accepted requirement of proof beyond a scintilla. However, it would appear essential that there be a definitive judicial pronouncement as to whether in reviewing a verdict a lower court judge can pick and choose the evidence to be considered; whether the reviewing judge must look for evidence and inferences supporting the verdict wherever found and, so to speak, put on blinders as to all inconsistent evidence; whether the reviewing judge can weigh the entire evidence or consider credibility even though to him something lacks credulity; whether the reviewing judge looks to the plaintiff's entire evidence or only to that part of it which may sustain the

verdict; whether he looks to evidence introduced in the plaintiff's case even where adduced from "opposition witnesses"; whether the reviewing judge must assume the full credibility of all evidence favorable to plaintiff and the lack of credibility of all adverse evidence; whether the reviewing judge can ever assume facts not in evidence or the reactions or knowledge of ordinary men in the absence of evidence thereon or contrary to evidence thereon.

We fully subscribe to Mr. Justice Frankfurter's concern with burdening the Court with a multitude of individual cases where consideration of the facts is the only problem. But by the same token, the pressure upon this Court to consider such cases will continue so long as the area of potential disagreement is continually widened by reason of judges usurping the function of juries to select the evidence and other factors against which the legal integrity of the verdict is to be measured. If by clear pronouncement of this Court the lower courts are required consistently to maintain a proper constitutional regard for the jury verdict on motion for judgment n.o.v. or for directed verdict any doubts those courts may have as to the fairness of a particular verdict based upon the entire evidence and their weighing of it can be resolved by the long-standing device of granting a new trial and thus obtain a second jury's view of the evidence. To permit the injection of considerations of which account might be taken on motion for new trial into the consideration of a motion for directed verdict or for judgment n.o.v. is to obscure their distinct historical and constitutional purposes.

CONCLUSION

For the reasons set forth above we urge this Court to issue a writ of certiorari so as to ascertain whether the courts below gave due and proper regard to the constitutional prerogatives of the jury in this case, in order to clarify the standards for judicial review of jury verdicts

and to assure that the same consistent standards and regard for the jury function will be consistently applied by all federal courts.

Respectfully submitted,

SHELDON E. BERNSTEIN
Pennsylvania Building
Washington, D. C.

HERBERT M. BRUNE
10 Light Street
Baltimore, Maryland

R. EDWIN BROWN
102 South Perry Street
Rockville, Maryland

HARPER M. SMITH
100 South Perry Street
Rockville, Maryland

Attorneys for Petitioners

Of Counsel:

BERNSTEIN & KLEINFELD
Pennsylvania Building
Washington, D. C.

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7786.

George Manaia, Jose Santos Gago, James R. Bice, Administrator of the Estate of Jose Lourenco, Deceased, State of Maryland to the use of Maria Da Conceicao Barreto, et al.,
Appellants,

versus

Potomac Electric Power Company,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
R. DORSEY WATKINS, DISTRICT JUDGE.

(Argued January 23, 1959. Decided June 18, 1959.)

Before HAYNESWORTH, Circuit Judge, and PAUL and BOREMAN, District Judges.

Sheldon E. Bernstein and Herbert M. Brune (R. Edwin Brown, Harper M. Smith and Newmyer & Bress on brief) for Appellants, and William B. Jones (Robert R. Blair, Cornelius Means, Hamilton and Hamilton, and Venable, Baetjer and Howard on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

Two employees of a paving contractor were killed and five others injured when the boom of a crane with which they were working was brought so close to high voltage wires that the current arced to the crane's cable and was conducted to the ground through the bodies of the unfortunate men who were touching the crane's metal load. Apparently because the deaths and injuries were compensable under Maryland's workmen's compensation act, these actions for wrongful death and personal injury were brought, not against the paving contractor whose negligence seems plain, but against the owner of the electric wires.

The District Court reserved its ruling upon motions for directed verdict, and, after verdicts for the plaintiffs, entered judgment for the defendant *non obstante veredicto*. In its full and careful opinion,[1] there is a very complete statement of the facts, which need only summary treatment here.

Potomac Electric Power Company (Pepco) owned a substation on the southwest corner of Old Bladensburg Road and Fern Street in Wheaton, Maryland, but set some distance back from the property line on each street. Among the circuits running into and from the substation is a 33,000-volt feeder, running west near the southern side of Old Bladensburg Road. This power line crosses Fern Street approximately 35 feet south of the southern side of Old Bladensburg Road, and corners on a pole slightly more than two feet from the western curb of Fern Street, each of its three wires being supported by three large bell-shaped, suspension insulators in series. From that pole the three wires run southwesterly to terminals on the substation. No other overhead power lines cross Fern Street, though there is a line running south from the substation along the west side of Fern Street.

[1] 163 F. Supp. 671

In 1955, Montgomery County decided to improve Fern Street. It was then an unimproved dirt road one and one-half to two blocks long, with only two or three buildings facing it.[2] Plans were sent to Pepco showing the proposed improvement. These plans called for a macadam surface for the northern part of Fern Street to a point at least twenty feet south of Pepco's power line crossing. South of that point, the plan provided for concrete surfacing. Pepco, accordingly, arranged to relocate several of its poles along Fern Street to clear the proposed work, and these relocations were accomplished. They included a relocation of the pole nearest Old Bladensburg Road, the one with the three series of heavy suspension insulators carrying the 33,000-volt feeder crossing Fern Street, this pole being moved a few inches to the west away from the western curb line of Fern Street. Otherwise, the crossing of this power line over Fern Street remained unchanged. A second set of plans was sent to Pepco, before the work was accomplished, identical with the first, as far as we are concerned, except that they bore a notation, for the paving contractor, requiring the use of concrete finishing machines on the concrete slabs, upon the basis of which the District Court assumed that Pepco had constructive notice that a mobile crane might, or probably, would be used to place the finishing machine upon its rails.

In July 1955, Montgomery County awarded a contract for the improvement of Fern Street to Sligo Engineering Company. Early in August, Sligo did the necessary grading during which time Pepco was engaged in the relocation of its poles and facilities.[3] After an interval of approxi-

[2] One of those buildings housed the offices of Sligo Engineering Company, the owner of the crane involved in these actions and the employer of the plaintiffs.

[3] Sligo's contract required it to notify utilities to make necessary adjustments to their equipment. Neither Sligo nor Montgomery County nor anyone else suggested that Pepco should

mately thirty days, a mobile crane owned by Sligo brought in a concrete finishing machine, deposited it on the east side of Fern Street, and withdrew to work on other projects. On September 2, 1955, Sligo set rails to contain and measure the first concrete strip, upon which the finishing machine would run. At approximately 10:30 o'clock that morning, Sligo's mobile crane arrived on the scene and positioned itself beneath the overhead crossing of Pepco's power line. The body of the crane was north of the crossing, the crane operator estimating that the power lines were some five to ten feet south of his cab at the rear of the truck, and plainly in his view as he worked his 40 foot boom rearward and southward. Working thus, immediately beneath the power line, the crane picked up the concrete finishing machine on the east side of Fern Street, south of the power line, and moved it into position over the rails north of the northernmost extremity of the proposed concrete strips, but still south of the power line. This required the crane operator to bring his boom close to the power line which was above and in front of him, the wires of which he was watching. His crewmen wished the machine positioned a few inches farther north, and, in response to their command, the operator, watching the wires of the power line all the while, raised his boom still closer to them.[1] Within seconds, two of his crewmen were

remove, alter or suspend the overhead crossing of its power line, except for the slight relocation of the one pole, which was accomplished. What was done was entirely satisfactory, apparently both to Sligo and Montgomery County, and there was no suggestion that Pepco then should have done more than it did.

[1] The lowest of the power line wires was some thirty feet above the roadway. Some feet below that was a header which would obstruct the passage of high equipment attempting to move along Fern Street. The heavy suspension insulators carried the power lines at the crane's location possibly a foot or more south of the header, which was centered on the two poles, and the highest at which the boom was raised permitted it to come in close proximity to the lower of the power line wires without being obstructed by the header.

electrocuted and the others, in contact with the finishing machine, were injured.

The crane operator had previous experience with crane booms fouling electric lines. He knew that electricity would arc to his metal boom, particularly on damp days, as that one was, when the boom and the ground were wet. Had he known the lines carried 33,000 volts, he would not have placed his boom within fifteen feet of them, he testified. He "assumed" the lines carried 1500 volts, but he stated no ground for his assumption, and he did not see the pole which supported the wires, the heavy insulators in series which carried them or the substation to which they ran, for he did not look. At the risk of his crewmen, he tested his baseless assumption without an inquiring glance to left or right.

The foreman, who directed the initial placement of the crane, did not testify.

Some of the surviving crewmen, who are plaintiffs, testified that they saw no power line for they did not look up, while others testified that they saw the wires but assumed they carried domestic current of 110 volts.* If it may be supposed that the construction crewmen were ignorant of the fact that such domestic current must be taken down from moderately high voltages by transformers not far distant from the loads, credulity is strained by the testimony of the chief executive officer of Sligo Engineering Company, whose offices were just to the rear of the substation, that he thought the three overhead wires on the heavy insulators were domestic current for the use of unapparent consumers. How far credulity may be strained here is of no importance, however, for the assumptions, without inquiry, of Sligo's executives and employees are

*The testimony discloses nothing in the area which could have been mistaken for a domestic or commercial service line coming from this power line.

immaterial to our present question. Pepco had a right to assume that a construction company and its construction crew would not intentionally foul its power line without a glance at the immediately adjacent pole and the insulators which carried the wires, the substation into which they led, or the area, without apparent domestic demand from this line, along its route, all of which showed the fact of high voltage.

The plaintiffs went to pains to elicit testimony, upon which they strongly rely, that one looking at the wires alone, could not tell what voltage they carried. Of course one could not. Perhaps one moderately observant could tell from the wires themselves that they were not domestic service lines, as the crane operator seems to have realized, but, if the field of view is widened to include the obvious insulators which carried the wires and still further extended to include the substation and the course of the power line, all of which was in plain view, one with any knowledge of electricity and its distribution would know this was a high voltage line. Whether it actually carried 13,200, 33,000, 44,000 or some other voltage, an expert perhaps, could not accurately tell immediately, but a reasonably informed amateur could tell that they carried a dangerous current and, if it was material to know, by a telephone call to Pepco, he could ascertain precisely what the voltage was.

It is thus apparent that this is not a case in which the plaintiffs were entrapped into contact with high voltage lines concealed from ordinary view, confusingly strung or deceptively re-energized.[6] No fault is suggested in the line, its construction, maintenance or operation. Though the line, itself, should have given to one who looked warning to stand clear, plaintiffs contend that Pepco should have

[6] See Conowingo Power v. State of Maryland, 4 Cir., 120 F.2d 870.

done something more to bring home to Sligo and its construction crew that the lines carried 33,000 volts. Had the construction crew consciously realized what the voltage was, it is said, it would have exercised greater care than it did to avoid the line's proximity.

Electricity is a dangerous thing and can work harm of such gravity upon one who comes into unintended contact with it, that power companies, rightly, have been required to exercise a very high degree of care to safeguard those whose lawful pursuit exposes them to the risk of inadvertent contact with the power lines. *Conowingo Power Co. v. State of Maryland*, 4 Cir., 120 F.2d 870; *Smith v. Appalachian Electric Power Co.*, 4 Cir., 74 F.2d 647; *Banks v. Central Hudson Gas & Electric Corp.*, 2 Cir., 224 F.2d 631; *American General Ins. Co. v. Southwestern Gas & Electric Co.*, 5 Cir., 115 F.2d 706; *Futrell v. Arkansas-Missouri Power Corp.*, 8 Cir., 104 F.2d 752; *Isbell v. Union Light, Heat & Power Company*, D.C., E.D., Ky., 162 F.Supp. 471; *Tedbleton v. Florida Power & Light Co.*, 145 Fla. 671, 200 So. 546; *Hagerstown & F. Ry. v. State*, 139 Md. 597, 115 Atl. 783; *Walter v. Baltimore Electric Co.*, 109 Md. 513, 71 Atl. 963; *Brown v. Edison Electric Illuminating Co.*, 90 Md. 400, 45 Atl. 182; *Pike v. Consolidated Edison Co. of New York*, 303 N.Y. 1, 99 N.E. 2d 885. They are not insurers, however, and their duty is not absolute. As the Court of Appeals of Maryland, whose decisions govern us in this diversity case, has said:[7]

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[7] De Vonas v. Acme Paper Board Co., 184 Md. 16, 40 A.2d 43. See also, State for use of, Baltimer v. Consolidated Gas, Electric Light & Power Co., 150 Md. 138, 156 Atl. 452; Burns v. Carolina Power & Light Co., 4 Cir., 193 F.2d 525; Croxton v. Duke Power Co., 4 Cir., 181 F.2d 306; Banks v. Central Hudson Gas & Electric Corp., 2 Cir., 224 F.2d 631; American General Ins. Co. v. Southwestern Gas & Electric Co., 5 Cir., 115 F.2d 706; Isbell v. Union Light, Heat & Power Company, D.C., E.D., Ky., 162 F. Supp. 471; Lewis v. Pacific Gas & Electric Co., 212 P.2d 243; Sweatman v. Los Angeles Gas & Electric Corp., 103 Cal. App. 318, 281 Pac. 677; Bell v. Utica Gas & Electric Co., 259 N.Y. 443, 182 N.E. 77; Van Beet v. Kilmer, 252 N.Y. 454, 169 N.E. 644.

> "In accordance with these basic principles, the law does not require that a person, who maintains over so deadly an instrumentality as a high voltage electric wire, shall anticipate at his peril every possible fortuitous circumstance under which some person might make a contact with the wire, resulting in injury or death. * * *
>
> "The law does not require an electric company to insulate its high-tension wires everywhere, but only where there is reason to apprehend that persons may come in contact with them either in the pursuit of their calling or where they may be reasonably expected to go. * * *".

If we assume, as the District Court did, that the notation on the second set of plans requiring the paving contractor to use a concrete finishing machine on the concrete strips to be poured south of the overhead power crossing was constructive notice to Pepco that a crane might, or probably would, be used to place the machine upon its rails, it was not notice that such a crane might be used beneath the power line, or in close proximity to it. The northernmost extent of the concrete strips was at least twenty feet south of the power line, and Pepco was hardly bound to anticipate at its peril that a crane would be positioned north of its power line crossing to place a concrete finishing machine upon rails at a point south of the crossing. In addition to the many alternatives open to Sligo, suggested in the opinion of the District Court, there is no apparent reason the finishing machine could not have been placed at the precise spot Sligo selected and without risk of fouling the power line by positioning the crane south of that spot, the crane operator facing north, the sheave of his boom being well short of the powerline. When Sligo, without disclosing to Pepco its specific purpose, undertook its accomplishment by a course of conduct fraught with

seemingly grave and obvious danger, while neglecting the equally practical alternatives which entailed no risk, its operations were beyond the bounds of anything Pepco might reasonably have anticipated. The crane had arrived upon the scene only a few minutes before the tragedy, and it is not contended that Pepco had any actual knowledge, or any opportunity to know, of its presence on Fern Street, much less of its operation beneath the power line. See cases cited in footnote 7.

Pointing to such cases as *Banks v. Central Hudson Gas & Electric Corp.*, 2 Cir., 224 F.2d 631; *Conowingo Power Co. v. State of Maryland*, 4 Cir., 120 F.2d 870; *Smith v. Appalachian Electric Power Co.*, 4 Cir., 74 F.2d 647; *Potomac Edison Co. v. State, Use of Hoffman*, 168 Md. 156, 177 Atl. 163; *Casualty Co. of America v. Swett Electric Light & Power Co.*, 230 N.Y. 199, 129 N.E. 653; *Pike v. Consolidated Edison Co. of New York*, 303 N.Y. 1, 99 N.E. 2d 885, the plaintiffs seek to draw a distinction between those cases in which the wires involved ran over, or along, public streets and ways and those in which the wires ran above private property, contending that in the former case the utility's duty approaches the absolute. Of course, there is a difference in the anticipated uses of streets and roads and those of undeveloped private lands. The hazards to be anticipated in construction work in crowded, commercial areas are not the same in kind or quality as those involved in construction, of the usual sort, on private land in rural areas. The differences affect the utility's duty of care, for the place of the work and a great many other circumstances must be considered in discriminating between risks which the utility should have anticipated and those which it need not have. In a given factual situation, however, the extent and nature of the utility's duty is not dependent upon the identity of the grantor of its easement. Here the wires were not in close proximity to work which Pepco might reasonably have anticipated. Sligo's use of Fern Street was one of those "fortuitous

circumstances" of which the Maryland Court of Appeals spoke in *Le Vonas* v. *Acme Paper Board Co.*, 184 Md. 16, 40 A.2d 43, and for which, under the decisions of that court, the power company is not responsible. See also: State for use of *Bahner* v. *Consolidated Gas, Electric Light & Power Co.*, 159 Md. 138, 150 Atl. 452; *Bains* v. *Carolina Power & Light Co.*, 4 Cir., 193 F.2d 525; *Creighton* v. *Duke Power Co.*, 4 Cir., 181 F.2d 306; *Banks* v. *Central Hudson Gas & Electric Corp.*, 2 Cir., 224 F.2d 631; *American General Ins. Co.* v. *Southwestern Gas & Electric Co.*, 5 Cir., 115 F.2d 706; *Isbell* v. *Union Light, Heat & Power Company*, D. C., E.D., Ky., 162 F.Supp. 471; *Lewis* v. *Pacific Gas & Electric Co.*, 212 P. 2d 243; *Sweatman* v. *Los Angeles Gas & Electric Corp.*, 101 Cal. App. 318, 281 Pac. 677; *Buell* v. *Utica Gas & Electric Co.*, 259 N.Y. 443, 182 N.E. 77; *Van Leet* v. *Kilmer*, 252 N.Y. 454, 169 N.E. 644.

We agree with the District Court that there was insufficient evidence of negligence of Pepco to support the verdicts.

Finally, it is said that granting these judgments n.o.v. was a denial of the plaintiffs' rights under the Seventh Amendment. It is apparent from their brief, however, that the learned counsel for the plaintiffs have no deluding impression that this contention adds anything of substance to their position. They seem to recognize that no constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. Nor do the parties here suggest that the power be allowed to atrophy, for its employment within its well defined boundaries is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury. The contention does not question the established

principles; it merely seeks an obscuring injection of the linguistics of constitutional principle into the familiar process of appraisal of evidence and its associated inferences.

Were a court indifferent to the established basis upon which powers have been allocated between the court and jury or beguiled into rejection of every view which seemed to it less reasonable than its own, a violation of constitutional right might well be said to have occurred. The District Court, here, however, was conscious of the limitations of its power, and conscientious and objective in its exercise. Citing *Burcham* v. *J. P. Stevens & Co.*, 4 Cir., 209 F.2d 35, he approached the problem "in the light of the admonition of the Court of Appeals of this Circuit as to the limited authority of trial judges to disturb jury verdicts," as do we. Even the plaintiffs describe his approach as "fair-minded." The attempt, therefore, to glamorize the problem by an invocation of the Seventh Amendment is, at best, an irrelevance contributing nothing to the objective disposition of such questions as this. See the opinion of Mr. Justice Frankfurter in *Dick* v. *New York Life Insurance Co.*, ... U.S. ..... (decided May 18, 1959); *Smith* v. *Reinauer Oil Transport Inc.*, 1 Cir., 256 F.2d 646.

Affirmed.

Judgment

Filed and Entered June 18, 1959

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7786

George Manaia, Jose Santos Gago, James R. Bice, Administrator of the Estate of Jose Lourenco, Deceased, State of Maryland to the use of Maria Da Conceicao Barreto, Joaquim Barreto Lourenco, by his next friend, James R. Bice, Richard P. Mason, William H. Davis, Maurice Floyd Ambush and State of Maryland to the use of John Fillmore Ambush, Appellants,

vs.

Potomac Electric Power Company, Appellee.

APPEALS FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause be, and the same is hereby, affirmed with costs.

June 18, 1959.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge

ILE COPY

Office-Supreme Court, U.S.
FILED
NOV 12 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 397

GEORGE MANAIA, ET AL., *Petitioners,*

v.

POTOMAC ELECTRIC POWER COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM B. JONES
916 Union Trust Building
Washington 5, D. C.

ROBERT R. BAIR
1409 Mercantile Trust Bldg.
Baltimore 2, Maryland

CORNELIUS MEANS
929 E Street, N. W.
Washington 4, D. C.

Counsel for Respondent

Of Counsel:

HAMILTON AND HAMILTON
916 Union Trust Building
Washington 5, D. C.

VENABLE, BAETJER AND HOWARD
1409 Mercantile Trust Building
Baltimore 2, Maryland

November 12, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS

Cases:

Banks v. *Central Hudson Gas & Electric Corp.*, 2 Cir. 1955, 224 F. 2d 631, Cert. denied, 350 U.S. 904 (1955) 2, 15-16

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Rublin v. *N. Y. Life Ins. Co.*, 304 U.S. 202, 206 (1938) 16

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (I TR 2-20) is reported at 163 F. Supp. 671. The opinion of the Court of Appeals for the Fourth Circuit (II TR 3-14, Petitioners' App. 1a-11a) is reported at 268 F. 2d 793.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether, without usurping the constitutional province of the jury, the District Court properly could enter judgment n.o.v., and the Court of Appeals properly affirm that judgment, where there was no evidence or reasonable inferences to be drawn from evidence that the respondent should have anticipated the use of a crane at the place and in the manner in which it was operated.

2. Whether, within the contemplation of Supreme Court Rule 19, there is a conflict between the decision below and the decision of the Court of Appeals for the Second Circuit in *Banks v. Central Hudson Gas & Electric Corp.*, 224 F. 2d 631 (1955), *cert. denied*, 350 U.S. 904 (1955), where the different results are attributable to differences in the facts and in the applicable substantive law of two different states.

3. Whether this diversity common law negligence action, which is of interest only to the parties and involves only the evaluation of facts, is one of national significance.

STATEMENT OF THE CASE

This is a common law negligence action, jurisdictionally founded on diversity of citizenship. Respondent is incorporated under the laws of the District of Columbia and the Commonwealth of Virginia; petitioners are citizens of other jurisdictions. It was tried before the court and a jury in the United States District Court for the District of Maryland. At the end of the trial, the District Court, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, reserved decision on respondent's motion for a directed verdict. (I TR 171.) Jury verdicts in favor of petitioners

followed and, thereafter, the District Court granted respondent's motion for a judgment n.o.v. (163 F. Supp. 671, I TR 2-20.)[1] The United States Court of Appeals for the Fourth Circuit affirmed the judgment n.o.v. (268 F. 2d 793, II TR 3, 15, Petitioners' App. 1a, 12a.)

The petitioners here, in urging that the writ should be issued, deemed it necessary to make an extensive comparison of the evidence. In an effort to aid their contention with respect to the facts in the case, petitioners have lodged with the Clerk of this Court nine copies of the brief they filed with the Court of Appeals. (Petition 5.)[2] In that brief they acknowledged that the trial judge was "fair-minded and conscientious." (Appellants' Brief 34.) The Court of Appeals stated that in the trial judge's "full and careful opinion, there is a very complete statement of the facts, which need only summary treatment here." (268 F. 2d at 794, II TR 4, Petitioners' App. 2a.)

Quoted in its entirety, including the court's footnotes, with record references supplied, the trial judge's statement of the facts reads (163 F. Supp. at 673-675, I TR 3-8):

> "Pepco is a public utility company, engaged in the generation and distribution of electric energy. Among its facilities are a sub-station in Wheaton, Maryland, on the Old Bladensburg Road, near its intersection with Fern Street. A 33,000 volt, three-wire electric line, supported by cross-arms on poles, crosses Fern Street at approximately

[1] Subsequently the District Court denied respondent's alternate motion for a new trial. 165 F. Supp. 486.

[2] Since the petitioners have lodged their brief below with the Clerk of this Court, the respondent has felt obliged similarly to make available its Court of Appeals brief, and accordingly has supplied the Clerk with nine copies of such brief.

30 feet south of Old Bladensburg Road, and enters the sub-station. The lowest wire at its critical point is 31 to 31½ feet above the surface of Fern Street. [I TR pp. 40; 121; Plfs.' Ex. Nos. 1-A through 1-G; I TR pp. 21-25; 127-128; Plfs.' Ex. Nos. 2-A and 2-B.]

"In the first part of 1955 Fern Street was an unpaved dirt road, extending for approximately one and one-half blocks south of Old Bladensburg Road. Montgomery County decided to have Fern Street paved, and on February 15, 1955, sent notice to abutting property owners, including Pepco, of a paving assessment. On June 8, 1955, a general plan of the proposed paving of Fern Street, and the adjacent territory, was sent to utility companies, including Pepco, having facilities in the vicinity. This called for the paving of Fern Street from Old Bladensburg Road south. While most of the paving was to be of concrete, consisting of four ten-feet wide strips, the northern portion, including the part directly[2] under Pepco's 33,000 volt line, was to be paved with macadam. It required that 'arrangements be made for prompt relocation of such utilities as may be fouled by proposed street improvements,' and stated that it was hoped work on the street would be started not later than June 20, 1955. [I TR pp. 56; 60; 96; Plfs.' Ex. Nos. 8-A, 8-B; I TR pp. 90-94.]

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[2] According to Pepco's Vice-President and General Manager, the blue print showed the concrete paving as ending 58.14 feet south of Old Bladensburg Road on the west side of Fern Street, and 72.68 [68.72] feet south, on the east side of Fern Street. [I TR 148-149] Plaintiffs contend that these readings should be 47 and 53 feet respectively, or 51 and 56 feet respectively, depending upon the diagram used. There is no question but that on any theory of the evidence the wire involved was located north of the south end of, and therefore within the area to be covered by, the macadam paving. A conservative estimate would put the critical point 20 feet north of the north end of the concrete.

"About the middle of July, 1955, the contract for the paving of Fern Street was closed with Sligo Engineering Company (Sligo), employer of the plaintiffs, and notice to proceed was given it. [I TR p. 94.]

"On July 20, 1955, a revised plan of Fern Street was sent Pepco. This was identical, as far as measurements were concerned, with the print in the letter of June 8, 1955, but contained the legend 'use cone.[3] finishing machine on slabs.' [I TR p. 93.]

"Fern Street was graded by Sligo during the period August 1-4, 1955, and some of Pepco's poles were moved by Pepco during this period. Among these was the pole on the west side of Fern Street carrying the 33,000 volt wires. This was moved six-tenths of a foot west, so as to place it a distance of two and one-tenth feet from the curb, because of proximity to the paving operation. The moving of the pole was not related to any relocation of the overhead wires, and at no time prior to the casualties was Pepco ever asked or directed by anyone to change the location of its overhead Fern Street wires, or to reduce or cut off the voltage running through them. [I TR pp. 56; 63-66; 139-140; 149-150.]

"Shortly before the first of September 1955 a representative of Pepco was present on the then graded but unpaved Fern Street. He was met by a Montgomery County inspector, who questioned him about the underground facilities of Pepco in the street. Specifically he was asked about the voltage of the wires in the underground conduits (which are 13,200-volt insulated lines). Nothing was asked or said about the voltage in the overhead uninsulated lines. At that time no crane

[3] It is not contested that 'cone.' is an abbreviation of 'concrete.'"

was present on the job, nor is there any evidence that a crane had been on Fern Street at any previous time. [I TR pp. 75; 76-78; 141; 146-147.]

"At a time fixed only as one week or one day before September 2, 1955, Louis Manaia[4] brought in a crane, took a concrete finishing machine off a trailer, and put it on the east shoulder of Fern Street, south of the 33,000 volt lines. [I TR pp. 96-98; Plfs.' Ex. Nos. 2-A, 2-B.]

"In a paving project of this kind, after grading, rails or forms are laid. These serve the dual purpose of fixing the width and approximate depth of the lane or slab of concrete poured, and of supporting a concrete finishing machine. [I TR pp. 49-50.] Such machines, specified for use in this paving, are often used in concrete paving. [I TR pp. 53; 79.] These are four-wheeled machines weighing a ton or more. They are approximately 12 feet long, adjustable in width to that of the lane or strip of concrete being laid and to be finished, are equipped with a chain driven blade, and are self-propelled. Their wheels run on the rails or sides of the lanes. The blade smooths, or 'finishes', the surface of the poured concrete. When one slab is finished, they can be driven off under their own power. Normally, one lane is then skipped, and work continued from either end of the next lane. [I TR pp. 53; 79-80; 88-90.]

"While on September 2, 1955, a few finishing machines were equipped with hydraulic lifts so that no extra equipment was needed to place them on the rails, it was customary to position them by use of either a front-end loader; an excavating shovel; the boom of a shovel; or a crane, the latter

[4] A non-resident third-party defendant, who was not served and did not enter an appearance. Statements made during the course of the trial indicated that he was then hospitalized. His testimony was therefore offered through deposition previously taken by Pepco."

being most frequently used. In such cases the finisher would ordinarily be lifted by a metal cable attached to the end of the cable boom. [I TR pp. 70; 83.]

"Sligo's crane, used to place the finisher, prior to September 2, 1955, on the east side of Fern Street south of the 33,000-volt wires was a new one, purchased in July 1955, and had a 40-foot boom. It was not equipped with an electric signalling device which would give warning of the approach of the boom to electrically charged wires. [I TR pp. 63; 68; 101.]

"Sligo had other paving work in the general vicinity of Fern Street, which it intended to finish before starting the concreting of Fern Street. No actual notice was given Pepco by anyone as to when the concrete work would begin on Fern Street, or that a crane would be used.[3] [I TR pp. 56-57; 63-66; 84; 171.]

"On September 2, 1955, at about 10:30 a.m., Sligo's crane was driven to Fern Street by George Manaia, one of the plaintiffs. It was backed in, stopping with the front, or truck, almost at Bladensburg Road. The crane itself was under the control of Louis Manaia, George's father, and a defendant. He had been instructed by Manuel Leal, superintendent of Sligo, to put the concrete finishing machine, brought in the day or week before, on the forms. The spot where the finishing machine was to be placed, and the location of the crane, were determined by Leal. [I TR pp. 98; 103; 154; 155.]

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[3] "The contract with Montgomery County required the contractor (Sligo) to take suitable precautions to prevent damage to underground or overhead public utility structures, and to notify public utility companies to make all necessary adjustments in their equipment. On other projects, Sligo had notified Pepco to move its poles, wires, et cetera in the way construction." [Def's. Ex. No. 1; I TR pp. 61-62; 66.]

"The Montgomery County inspector, who first learned 'positively' that a crane would be used when it came onto Fern Street that morning, called to Leal's attention that the crane would be working under wires. Although the inspector did not know the voltage of the wires, he cautioned Leal, but would have permitted Leal to proceed, even if the inspector had known the wires carried high voltage. [I TR pp. 75; 81; 82; 84; 85.]

"The point selected by Leal for the placing of the finishing machine on the form was north of where the concrete would begin. As a consequence, when the crane was positioned, the wires were five to ten feet to the south, or in front, of Louis Manaia, who could see them clearly from the open cab of the crane. The boom was swung to the left, and the finishing machine picked up. To swing it around and place it, the boom had to be raised over 30 feet. Louis Manaia lifted the finishing machine with the crane and brought it over the forms and close to them. At that time the boom was three feet from the wires. Louis Manaia was watching this distance carefully. Although he thought that the wires carried about 1,500 volts, he watched them carefully, since he knew that electricity could arc from wires, without direct contact. He knew he could contact wires and that electricity was dangerous. He had put booms in wires before. [I TR pp. 95; 99; 101; 102-103; 104; 105; 106; 108-109.]

"The place where Louis Manaia was to place the finishing machine was beyond (north of) the point where the concrete was to start. Had the finishing machine been set over where the concrete was to begin, the crane would not have been under the wires.[6] [I TR p. 99.]

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[6] The crane operator testified: "* * * I am bringing my point, sir, because where the concrete is if I had to set the machine over there, I wouldn't be under the wires at all." [I TR p. 99.]

"For some reason not clear from the evidence,[7] apparently it was thought by Sligo to be desirable to start from the north, or Bladensburg Road, end and work south. [I TR pp. 60-61.]

"At this time, seven or eight men, including George Manaia, who had left the truck of the crane and had joined others in helping position the finishing machine, were holding on to it. Some one[8] then indicated that the finishing machine should be placed slightly further north and gave instructions to 'boom up.' [I TR pp. 101; 104; 157; 168.]

"Louis Manaia then raised the boom so that it was approximately 30 inches from the lowest wire. He was watching the boom at the time so as not to come too close. He then set the brake, which would prevent any sway of the boom, or of the machine. [I TR pp. 101; 102; 109-110.]

"Within a few seconds (five, more or less) he looked and saw the decedent Lourenco 'on fire.'

"[7] It was immaterial to Montgomery County whether the laying of the concrete began at the north or south end. Ready-mixed concrete was used. Plaintiffs contend that starting at the north and working south was more economical. If, as the Montgomery County inspector testified, it was customary to lay one lane, then skip a lane, it would appear that the laying of at least two lanes would have to start from the south. [I TR pp. 60-61; 81-88-89.]

"Apparently the finishing machine was intended by Leal to be positioned north of the beginning of the concrete so that the finishing machine would not be in the way of the initial pouring. It could of course have been placed on the rails at any place and then been pushed to any desired location. The evidence made it clear that it was self-propelling, but did not indicate whether it could or could not travel in reverse under its own power."

"[8] There is conflict as to who gave these instructions. While perhaps important on the question of contributory negligence, in view of the court's opinion on the question of primary negligence, it is not necessary to resolve this conflict on the motion for judgment n.o.v."

Manaia was positive that he did not touch the wires with any part of crane, but that the current came from arcing. [I TR pp. 106; 110.] It was necessary to break this flow of current, but he was afraid to swing the boom and machine to either side, as it might drag the men along. Accordingly, by working one lever he picked up the load, and with another he lowered the boom.

"Louis Manaia further testified that pitting, or 'buckshot', indicated that the current entered the boom support lines, 10 to 15 feet below the forward end of the crane boom. [I TR p. 107.]

"On two other occasions in 1955, Louis Manaia had put booms in wires before; had burned down one wire, and burned or pulled down another. [I TR p. 109.] The evidence did not make it clear what kind of wires were involved, or whether they crossed or paralleled the road; or what was the nature of the crane operations on these occasions."

ARGUMENT

I.

The Decision Below Is Clearly Correct

Petitioners' claim, in essence, is that the decision by the two lower courts is, on the particular facts of this case, wrong. They seek to obscure this, and to change the cause from simply a negligence case involving only 'normal' local issues, to one of general and, indeed, national significance, by declaring, sonorously, that the lower courts' disposition of the case "requires that this Court rearticulate the constitutional dichotomy of functions between judges and juries and the *modus operandi* for maintaining that dichotomy so as to preserve the jury's exclusive power to select the evidence to be considered in arriving at a verdict". (Petition 3.) But try as they may, they cannot circumvent the actuality

that this case turned upon its own particular facts and is of consequence only to its parties.

Despite the fact that in the petitioners' own words the trial judge was "fair-minded" and "conscientious" (Appellants' Brief 34) and his statement of the facts was "detailed," "well organized" and "essentially fair insofar as it goes" (Appellants' Brief 3), petitioners argue here, as they did in the Court of Appeals, that the trial judge "ignored . . . a multitude of evidence and factors of human experience" (Petition 8) which allegedly supported the verdict and which they now contend were also disregarded by the appellate court. (Petition 7.) An examination of that contention (with the paragraphs being numbered to correspond with petitioners' six numbered items of so-called ignored evidence) shows it to be without merit:

(1) Petitioners assert that the placing of the concrete finishing machine under the overhead wires on the day of the accident was the most efficient and approved way to start the construction work. But the record references cited by petitioners (I TR 59-60, 87) contain no evidence whatsoever that it was the most efficient way to start the work. On the contrary, the record shows that the place of operation was selected by the paving company solely because of economy. (I TR. 59-61.) The fact that the Montgomery County inspectors, without any notice to respondent, approved the paving company's starting the construction work at the north end of Fern Street and beyond the area that was to be paved with concrete furnished no notice of any character to respondent that concrete paving equipment would be placed under the clearly apparent overhead wires.

(2) Petitioners are without any record support for their assertion that respondent's wires running down the west side of, but off of, the street to be paved, were or could be involved in the paving work engaged in by petitioners. It was not those wires, but rather the electric wires that crossed the street, which were involved in the accident, and the lower courts had before them the question of whether there was any evidence or reasonable inferences to be drawn from evidence by which the jury could conclude that respondent knew or should have known that concrete paving work was to be done under the electric wires that crossed the street. The only other wires crossing Fern Street were two guy wires, which, of course, were not energized. (Plfs.' Exs. 1-C and 1-D, 1 TR 21.)[3]

(3) and (5) Any evidence that construction people, who saw or could have seen the wires, could not be expected to know whether they were high or low voltage wires is qualified and rendered insignificant by the law of Maryland that any electric wire "is notice of danger, and any person mindful of his safety should treat it with caution." *Le Vonas* v. *Acme Paper Board Co.*, 184 Md. 16, 21, 40 A. 2d 43, 45 (1944). See also *State, for the use of Bahner*, v. *Consolidated Gas, Electric Light & Power Co.*, 159 Md. 138, 143, 150 A. 452, 454-455 (1930). In *Le Vonas*, where the plaintiffs were injured when electricity arced 48 inches from high voltage electric wires to the cable of a crane, the court said: "Whether or not they had been warned that the wires were high voltage, they could easily see that there were two groups of wires, the upper containing three wires, the lower four, with large insulators near the poles."

[3] Petitioners have lodged with the Clerk of this Court one copy of the bound volume of exhibits. (Petition 12, n. 6.)

(40 A. 2d at 462) Here, in our case, the overhead wires were also clearly visible and not only were there large insulators near the pole but also within 65 feet there was an electric substation with clearly visible transformers to which the wires ran. (I TR 107-108, Plfs' Exs. 1-B, 1-H, I TR 21, 27.) Moreover, respondent had no obligation affirmatively to warn construction people of the voltage in clearly visible wires more than 31 feet above the ground until it had either actual or constructive notice that high equipment would be operated under and in close proximity to those wires.

(4) Prior to the date of the accident the crane involved had been on Fern Street on only one occasion, and that for but a very few minutes. (I TR 96-97.) On the day of the accident, the crane was on the street for only about 15 to 30 minutes prior to the accident. (I TR 155.) Respondent admittedly had no actual notice that a crane was to be used on either occasion and the record is devoid of any evidence from which it could be inferred that respondent should have known that the crane would be operated on Fern Street within close proximity to its wires. (I TR 171.) The fact that on some prior indefinite occasions at other unnamed places other cranes had contacted other wires of respondent affords no basis for concluding that respondent should have known that a crane would be operated in close proximity to the overhead wires crossing Fern Street.

(6) Short answers to petitioners' unsupported assertion that respondent lacked any safety program to guard the public against injury from its power lines are that the overhead wires here in question were more than 31 feet above the street, insulated by height and isolation, and that there is no evidence whatsoever that the wires were improperly or unsafely con-

structed or maintained or that their maintenance violated any statute, ordinance, regulation or good practice.

Petitioners admit that there is no evidence of respondent having had actual knowledge of the use of the crane. (I TR 171.) And as to constructive knowledge, the trial judge dealt at length with the vital question of whether there was any evidence or reasonable inferences to be drawn from evidence that could be the basis of a jury finding that respondent should have anticipated that a crane would be operated at the place and in the manner in which it was in fact operated. As has been shown, the petitioners' six points of so-called ignored evidence, taken individually or collectively, have no bearing whatever on this question and therefore could not possibly support a jury verdict. Thus falls petitioners' charge that "the District Court [despite its admittedly being "fair-minded" and "conscientious"], with Court of Appeals' approval, engaged in a process of gerrymandering through the evidentiary record and selecting that evidence, those inferences, and those factors of ordinary experience which it deemed appropriate for consideration . . . discarding all others." (Petition 6-7.)

Understandably, petitioners dislike the result in the courts below. Naturally enough, they would like this Court to give them another opportunity to salvage the verdicts. But if the petition in this case were to be granted, it would invite the future filing of petitions in a vast number of cases of importance only to the particular litigants, involving only the evaluation of facts and lacking all general or national significance or interest. As the respondent understands the position that this Court has taken, its certiorari jurisdiction is not to be exercised for such purposes.

II.

There Is No Conflict of Decisions

Without merit is petitioners' argument that the decision below is in conflict with that of the Court of Appeals for the Second Circuit in *Banks* v. *Central Hudson Gas & Electric Corp.*, 224 F. 2d 631 (1955), *cert. denied*, 350 U.S. 904 (1955). Neither as a matter of fact nor one of law is there such a conflict.

In *Banks*, a building was to be constructed, part of which would be in close proximity to overhead electric wires. The electric company had been informed of the construction of the building and it *had actual knowledge* that a 40 foot crane was to be *extensively* used in connection therewith. Prior to the accident a representative of the electric company had been on the building site and had observed the close proximity of the crane to the overhead wires. He knew of the possibility of injury resulting from the operation of the crane so near the wires, but he did not warn the plaintiff or the latter's employer.

Here, on the other hand, where the use of the crane was special, temporary and extraordinary, there is admittedly no evidence that respondent had any actual knowledge that a crane was to be used nor is there any evidence from which it could be inferred that respondent should have anticipated that a crane would be used at the place, in close proximity to the wires, and in the manner in which it was in fact operated.

Thus, there is no conflict between the two Circuits. The difference in result stems naturally from the differing facts.

But even if the facts were the same, the two cases would not be in conflict within the contemplation of

this Court's Rule 19. In *Banks*, the Second Circuit, after noting that the parties conceded that New York law was applicable, applied that law. (224 F. 2d at 634.) In the light of the facts and under the New York law, the Court concluded that the electric company was under a duty to warn the plaintiff. Here the Court of Appeals for the Fourth Circuit, as well as the District Court, applied (as they were required to do) the law of Maryland in deciding the rights and obligations of the parties. (268 F. 2d at 797, II TR 10. Petitioners' App. 7a; 163 F. Supp. at 677, I TR 11.)

This Court has stated that as to questions controlled by state law a conflict among circuits is not of itself a reason to grant a writ of certiorari, since the conflict may be merely corollary to a permissible difference of opinion in the state courts. *Ruhlin* v. *N.Y. Life Ins. Co.*, 304 U.S. 202, 206 (1938).

Petitioners in effect argue that the Fourth Circuit, in contrast to the Second Circuit, is indifferent to the constitutional right of a jury trial. (Petition 17.) But it is to be noted that in considering respondent's motion for judgment n.o.v. the District Court stated (163 F. Supp. at 672, I TR 2-3):

> "It will therefore be necessary to review the facts in the aspects most favorable to plaintiffs, and determine whether they afford a reasonable basis for the verdicts, in light of the admonition of the Court of Appeals of this Circuit as to the limited authority of trial judges to disturb jury verdicts. Burcham v. J. P. Stevens & Co., 4 Cir., 1954, 209 F. 2d 35, 38."

And in its review of the decision of the District Court, the Court of Appeals was itself clearly mindful

of the limitations on the authority of the trial judge, also citing the *Burcham* case.[4] (268 F. 2d at 799, II TR 14, Petitioners' App. 11a.)

The decisions of the courts below resulted from proper exercise of their limited judicial power as to which they each gave express recognition.

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[4] Judge Parker, in expressing the opinion of the court in *Burcham v. J. P. Stevens & Co.*, 209 F. 2d 35 (4 Cir. 1954), stated (pp. 38, 40):

> "The courts are constantly urged in cases of this character to substitute their judgment for that of the jury on questions of fact; and the seductive argument is made that a conclusion of fact which appears to the court to be reasonable is so clear that reasonable men could reach no other. If this sort of reasoning is allowed to prevail, however, it means that the courts are substituting their judgment for that of the jury on fact questions in violation of the constitutional requirement. Where there is a determinative fact in a case which is either admitted or established by evidence so conclusive that reasonable men could entertain no doubt with regard to it, the court should, of course, direct a verdict as a matter of law; but this does not mean that the court should direct a verdict on a weighing of the evidence or on a decision as to what inferences to be drawn therefrom are the more reasonable. * * *
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> * * *
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> "Whether a question is one for the decision of the court or of the jury is a question of federal practice as to which we are governed by federal and not by state decisions. We are bound by state decisions as to the substantive law applicable in a case of this sort, but by federal law, not state law, as to whether a question is for the decision of the judge or the jury under the Seventh Amendment."

But even if this were a case where the Maryland law of practice controlled, the result would have been the same. See *Le Vonas v. Acme Paper Board Co.*, 184 Md. 16, 40 A. 2d 43 (1944), where, as the trial judge here noted, a verdict was directed for the electric power company. (163 F. Supp. at 678, I TR 12.)

III.

There Are No Special and Important Reasons for Granting the Writ of Certiorari

Notwithstanding the fact that there is here no conflict of decisions and that the decision below is correct, petitioners would have this Court believe that there is an important constitutional question to which it should give its attention. They argue that this Court should redefine the standards and methods for judicial review of jury verdicts in order that the judicial power to review verdicts may be reconciled with the constitutional requirement of the Seventh Amendment.

While they disclaim it, that for which petitioners actually contend is, in effect, an abrogation of the directed verdict and judgment n.o.v. judicial powers. They disregard this Court's determination that in a proper case, as here, a verdict should be directed or a judgment entered notwithstanding the verdict. *Galloway* v. *United States*, 319 U.S. 372 (1943); Rule 50(b), Federal Rules of Civil Procedure. Time after time such judicial power with its limitations has been defined. See e.g. *Galloway* v. *United States*, *supra*; *Brady* v. *Southern Ry. Co.*, 320 U.S. 476 (1943); *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944); *Myers* v. *Reading Co.*, 331 U.S. 477 (1947).

As has just been noted in the preceding section of this brief, the courts below were well aware of the limitations on their judicial power to grant a motion for a judgment n.o.v.; their opinions expressly refer to it. (268 F. 2d at 799, II TR 14, Petitioners' App. 11a; 163 F. Supp. at 672, I TR 2-3.)

Petitioners do not aid their cause by quoting language used by members of this Court in cases arising

under the Federal Employers' Liability Act. (Petition 21-31.) This Court has said that "the special features of [an F.E.L.A.] statutory negligence action . . . make it significantly different from the ordinary common-law negligence action. . . ." *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 509-510 (1957). See Note, *Certiorari Policy In FELA Cases*, 69 Harv. L. Rev. 1441, 1450 (1956).

This case is of no importance save to the parties. It concerns no federal question or national issue. It is a decision based on the particular facts involved and will not serve as a precedent. Once concluded, it will lack further significance. A grant of the writ of certiorari here would only invite lawyers to seek review of the many negligence cases tried in the Federal courts. In addition to taking up over half of the time of the trial judges in the District Courts, such litigation would overburden this Court as well, since, as to every negligence case coming before him on a petition for a writ of certiorari, each member of this Court "is charged and properly charged with making an independent examination of the right of access to the Court." See Mr. Justice Frankfurter, dissenting, in *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437, 456 n. 28, 460 (1959).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM B. JONES
916 Union Trust Building
Washington 5, D. C.

ROBERT R. BAIR
1409 Mercantile Trust Bldg.
Baltimore 2, Maryland

CORNELIUS MEANS
929 E Street, N. W.
Washington 4, D. C.

Counsel for Respondent

Of Counsel:

HAMILTON AND HAMILTON
916 Union Trust Building
Washington 5, D. C.

VENABLE, BAETJER AND HOWARD
1409 Mercantile Trust Building
Baltimore 2, Maryland

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